

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL JOSEPH RAFFLER,

Defendant-Appellant.

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UNPUBLISHED

June 24, 2014

No. 313683

Macomb Circuit Court

LC No. 2012-000756-FC

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age). He was sentenced to 135 to 240 months' imprisonment for each conviction and now appeals by right. We affirm defendant's convictions, but we remand for resentencing.

Defendant argues that the prosecution failed to present legally sufficient evidence to support his convictions of first-degree criminal sexual conduct. Specifically, he argues that the victim testified that she never saw defendant's penis during the alleged instances of sexual penetration. Further, defendant contends that beyond the victim's statement that she felt pain in her vagina, there was no other evidence to demonstrate that sexual penetration ever occurred. We disagree.

In a challenge to a criminal conviction based on insufficient evidence, this Court reviews the record de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). This Court considers whether the evidence, taken in the light most favorable to prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

In this case, the elements of first-degree criminal sexual conduct are (1) sexual penetration with a person, (2) who is under 13 years of age. MCL 750.520b(1)(a). As defined by MCL 750.520a(r), sexual penetration means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body."

Defendant argues that based on the evidence presented at trial, a rational trier of fact could not have concluded beyond a reasonable doubt that defendant engaged in sexual

penetration with the victim. Defendant's argument lacks merit in light of the victim's testimony that during both alleged incidents, defendant rolled on top of her, pinned her to the bed, and spread her legs. When asked if she felt anything hard in the bed, the victim stated, "[defendant's] penis." Then, on both occasions, the victim felt pain inside her vagina. Though the victim did not actually see defendant's penis during the encounters, she did feel it, and her testimony clearly alleged that defendant engaged in sexual penetration during both incidents.

While other witnesses, members of the victim's family, testified that the victim lied often and was not credible, this Court "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The victim testified in great detail that defendant had sexually abused her earlier in her childhood, and patently, the jury found her credible in her specific allegations regarding sexual penetrations as it found defendant guilty. Further, defendant's argument on appeal, that the victim never saw defendant's penis, has little significance; a victim's visual observation of sexual penetration is not an element of first-degree criminal sexual conduct. Taking the evidence in the light most favorable to the prosecution, the victim's testimony alone was sufficient evidence for a rational trier of fact to conclude that defendant was guilty beyond a reasonable doubt.

Defendant next argues that the trial court's exclusion of Tanya Hollbrook's testimony was an abuse of discretion and a violation of his right to present a defense. Specifically, defendant contends that the testimony regarding the victim's past behavior and demeanor should have been admitted because it was inconsistent with her testimony at trial. We disagree.

This Court reviews the evidentiary rulings of a trial court for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Generally, "all relevant evidence is admissible." MRE 402. But "evidence which is not relevant is not admissible. MRE 402. Pursuant to MRE 401, relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence must be both material to a fact at issue and have probative value, i.e., making the material fact more or less likely. *People v Benton*, 294 Mich App 191, 198-199; 817 NW2d 599 (2011).

At trial, Hollbrook testified that she had allowed defendant to babysit her children in 2011, that she never saw the victim behave fearfully around defendant, and that the victim "was kind of very quiet," and had "low self-esteem maybe." Hollbrook also stated that the victim would "get really upset" about "small things." The trial court then sustained the prosecutor's objection on the ground of relevancy and instructed the jury to disregard Hollbrook's testimony. We agree that the victim's past behavior and demeanor was not material, nor was it probative. Hollbrook's statements that the victim was quiet, lacked self-esteem, and would get upset about small matters were not material to the issues in this case. Moreover, even if Hollbrook's statements were true, those facts had no bearing on whether defendant committed first-degree criminal sexual conduct or whether the victim was a credible witness. Hollbrook only testified to

her opinion on personality traits that had no bearing on any issue in this case. Thus, Hollbrook's testimony was not probative of any fact of any consequence to the case. Though Hollbrook's statements may have implied that the victim carried some negative personality traits, those traits had no bearing on any element of the charged offenses, or on her credibility as a witness.

Defendant's argument on appeal relies on little legal authority. Defendant does not argue how the victim's quiet disposition, low self-esteem, or tendency to become upset about small matters had any bearing on her credibility as a witness. Additionally, though defendant correctly asserts that criminal defendants have a constitutional right to present a defense and to receive a fair trial, he provides absolutely no supporting argument involving facts from this case. Defendant, in fact, presented witnesses who testified regarding the victim's credibility. Accordingly, defendant's evidentiary and constitutional claims are abandoned. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (cursory treatment of an issue with little or no citation of supporting authority constitutes abandonment).

Defendant next argues that the trial court erred when it assigned 50 points for Offense Variable (OV) 11 and 50 points for OV 13. Specifically, defendant contends that OV 11 should have been assigned zero points because instances of sexual penetration occurring on different dates cannot be used in scoring the offense variable. Further, defendant argues that OV 13 should have been assigned zero points because the prosecution did not prove that the first alleged incident of sexual abuse occurred within five years of the sentencing offenses. Defendant argues that because correction of the scoring will change defendant's sentencing guidelines range, he is entitled to resentencing. We agree.

"Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurlyczyk*, 443 Mich 289, 303; 505 NW2d 529 (1993). This Court reviews de novo "whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute . . ." *Hardy*, 494 Mich at 438.

OV 11 requires the trial court to "score all sexual penetrations of the victim by the offender arising out of the sentencing offense." MCL 777.41(2)(a). Fifty points may be assigned for OV 11 when "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). But in scoring OV 11, the trial court may not "score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c). In order to satisfy the "arising out of the sentencing offense" requirement, penetrations must spring from or result from the sentencing offense, having a connective or a cause and effect relationship that is more than incidental. *People v Johnson*, 474 Mich 96, 101; 712 NW2d 703 (2006); see also *People v Johnson*, 298 Mich App 128, 132; 826 NW2d 170 (2012).

The prosecutor concedes on appeal that OV 11 should have been assigned zero points. Further, the prosecutor agrees that because of this error, defendant is entitled to resentencing. Where the trial court's scoring error results in a defendant's being sentenced under an incorrect guidelines range, that defendant is entitled to resentencing. See *People v Francisco*, 474 Mich 82, 89-90; 711 NW2d 44 (2006).

Points are assigned under OV 13 when a defendant has engaged in a continuing pattern of criminal behavior. MCL 777.43(1); *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013). Fifty points may be assigned for OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.” MCL 777.43(1)(a). In scoring OV 13, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). But “only those crimes committed during a five-year period that encompasses the sentencing offense can be considered.” *Francisco*, 474 Mich at 86.

In this case, the record is unclear whether a preponderance of evidence supports a 50-point score for OV 13. In order to assign 50 points for OV 13, the trial court was required to find that a pattern of felonious criminal activity involving three or more sexual penetrations occurred within a five-year period, including the sentencing offenses. MCL 777.43(2)(a); *Francisco*, 474 Mich at 86. At the sentencing hearing, defense counsel argued that OV 13 should be assigned zero points because there was insufficient evidence of other sexual penetrations, and any other penetrations that did occur were not within a five-year window of the sentencing offenses. The trial court stated:

[T]he Court is going to find that there clearly was evidence that indicated that this was a pattern of behavior that occurred. The child in one house and then I think they moved to another house and it continued. And, actually, the charges occurred in the second house, or the third house maybe, but in any event, the other part, the part that happened in the first house would still count. So, therefore, I’m going to overrule that objection to OV 13 and leave it at 50.

Defendant is correct in his observation that the specific events in this case were not narrowed to specific dates, or even specific months. The prosecution argues that defendant’s sexual penetrations started when she was five years old and continued until the time of the instant offenses, when she was 10. Specifically, the victim estimated that the incidents took place between May 2, 2006, and May 2, 2007; they occurred at the family residence in Center Line, Michigan, and she believed that they occurred during the school year. Further, the victim stated that the first instances of sexual penetration began when she was approximately five years old, at her grandparents’ home in Troy. On the other hand, she also stated that she could have been as much as two years younger at the time, though she was sure she was no older than five years old.

The difficulty in reviewing this issue for clear error is that the trial court did not actually make findings of fact regarding the timeline of sexual abuse, other than its statement that sexual abuse occurred in several different houses where the victim’s family resided. Because we are already remanding this matter for resentencing on the basis of the error in scoring OV 11, on remand the trial court should conduct an evidentiary hearing on this offense variable, if necessary, and make specific findings of fact regarding the scoring of OV 13.

In his Standard 4 brief, defendant argues that he received ineffective assistance of counsel at trial. Specifically, defendant contends that defense counsel advised him and his wife not to testify at trial, and that that advice was unreasonable trial strategy. Further, defendant argues that

defense counsel should have presented evidence that the victim suffers from severe mental illness, and that defense counsel failed to interview and call witnesses who would have testified in defendant's favor. Finally, defendant contends that defense counsel failed to highlight the extreme difference in defendant's weight between the time of the trial and the time of the offenses, which would have made the victim's testimony less credible. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The lower court's findings of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.* Because defendant did not move for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Criminal defendants have a right under the United States and Michigan Constitutions to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness; (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The defendant bears a heavy burden of overcoming a strong presumption that counsel's assistance constitutes sound trial strategy. *Id.* at 52. This Court will not second-guess defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess counsel's competence. *Odom*, 276 Mich App at 415.

Defendant claims that defense counsel advised him and his wife not to testify "because [they] would not understand the questions." But the record reveals that defendant stated during the trial that defense counsel had explained his right to testify, and defendant had decided he did not wish to. Defendant did not voice any reservations about any alleged advice from defense counsel that he not testify. Because this Court's review is limited to the existing record and the record contains no pertinent evidence, we find there is no support for the claim that defense counsel advised defendant or his wife not to testify.

Defendant also alleges that it constituted ineffective assistance of counsel when defense counsel failed to present evidence about the victim's "severe mental illness." But defense counsel actually did present evidence about the victim's medical diagnosis. Specifically, the victim's grandmother testified that the victim was "definitely bipolar with bipolar depression," and was prescribed medications for her condition. Defendant also alleges that defense counsel "failed to interview and call witnesses who would have testified in [his] favor;" however, defendant does not state who those witnesses are or what their testimony might have been.

Finally, defendant argues that defense counsel should have presented evidence demonstrating the defendant was significantly heavier at the time of the offenses. According to defendant, he weighed 400 pounds at the time of the alleged offenses; therefore, sex between defendant and the victim would have resulted in "physical damage" to the victim. But there was no evidence presented at trial to demonstrate that defendant actually weighed 400 pounds at the time of the offenses. Although there was evidence that defendant suffered from numerous health

problems at the time of the offenses, including heart problems that caused defendant to tire extremely easily, evidence of his weight was not presented.

Because this Court is limited to reviewing the evidence on the record, there is no basis to conclude that any of defendant's arguments have merit. Not only does defendant fail to argue how defense counsel's performance fell below an objective standard of reasonableness, but also there is no evidentiary basis for any of the alleged facts defendant argues should have been presented at trial. Defendant has not articulated any reviewable errors of defense counsel. Because defendant has not demonstrated any errors defense counsel made at trial, we need review this matter no further. *Trakhtenberg*, 493 Mich at 51.

Defendant also argues that defense counsel's alleged advice that he and his wife should not testify violated his right to testify and to present a defense; however, defendant provides no relevant legal or factual argument on the issue. As noted, defendant stated that defense counsel advised him of his right to testify, and he decided he did not wish to testify. Defendant's argument is meritless.

We affirm defendant's convictions, but remand to the trial court for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey